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In the Supreme Court of the United States

CREDIT SUISSE FIRST BOSTON LTD., ET AL.,

Petitioners,

v.

GLEN BILLING, ET AL.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

REPLY TO BRIEF IN OPPOSITION FOR RESPONDENT MILTON PFEIFFER

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REPLY TO BRIEF IN OPPOSITION FOR RESPONDENT MILTON PFEIFFER

This case consolidates two class actions that the Second Circuit held are not barred by implied immunity. Pet. App. 72a. One suit, *Billing*, alleges violations of the Sherman Act by investment banks resulting from their underwriting of some 900 technology-related IPOs during the market bubble of the late 1990s. The district court explained that the second class action, *Pfeiffer*, brought against investment banks and some of their institutional customers, challenges the "same practices" by labelling them as "commercial bribery" under the Robinson-Patman Act, 15 U.S.C. § 13(c). *Ibid.* In both cases the Second Circuit rejected the views of the SEC and district court and accepted the arguments of the Department of Justice on the dispositive issue of implied immunity. Plaintiffs in *Billing* have waived their response to the petition. This brief replies to the opposition in *Pfeiffer*.

Pfeiffer's perfunctory opposition does not come to grips with the compelling reasons for review set forth in the petition and amicus briefs submitted by the National Association of Securities Dealers, the New York Stock Exchange, and the Securities Industry Association. Congress placed self-regulatory organizations like the NASD and NYSE, which are overseen by the SEC, at "the front line of enforcing compliance" with the securities laws. Brief *Amicus Curiae* of NYSE at 6; Brief *Amicus Curiae* of NASD at 8. Both SROs have explained there is "an urgent need for this Court to grant certiorari" because these antitrust suits are "fundamentally inconsistent with the regulatory regime that Congress established when enacting the securities laws" and threaten the Nation's capital markets. NASD Br. 7; NYSE Br. 3-4, 13.

Nor does Pfeiffer seriously address the SEC's explanation of the need for immunity in this case (Pet. App. 124a-158a, 180a-198a), or the holdings in *NASD*, *Gordon*, and

Trinko. He offers no reason why this Court should deny review here when it granted review in *NASD* and *Gordon*, where the SEC likewise contended that immunity was necessary to preserve its regulatory authority, and the Department of Justice likewise disagreed. Nor does he explain how this case is less worthy of review than *Trinko* where, despite an antitrust savings clause, this Court recognized that antitrust suits would improperly disrupt a comprehensive scheme of regulation. Beyond this, he nowhere disputes petitioners' showing that the Second Circuit's ruling conflicts with decisions of several other circuits. Pet. 25-26.

As petitioners and amici have shown, this Court's intervention is essential to protect the securities regulatory regime, including not only the statutory authority of the SEC and the SROs that operate under its supervision, but also the stringent limitations that Congress has imposed on private securities actions in legislation such as the Private Securities Litigation Reform Act (PSLRA), which Pfeiffer seeks to bypass. Pfeiffer's contrary contentions are easily refuted.

1. Pfeiffer concedes (at 2) that the *Billing* plaintiffs attack the basic elements of the syndicate underwriting process which are essential to "the capital raising abilities of the United States financial markets." Pfeiffer asserts that "[h]is theory" is different, because he alleges underwriters "paid bribes to, or received bribes from" institutional investors "to inflate the price of the hot issue securities in the aftermarket," and therefore does not challenge "pre-offer underwriting activities." *Ibid.* In fact, Pfeiffer's "bribe" theory is just a rehash of the "tie-in" allegations in *Billing* dressed up in Robinson-Patman Act terminology. See Pet. App. 75a, 121a. Pfeiffer admits (at 2) that the Second Circuit "correctly" characterized his claims. In doing so, the court recounted Pfeiffer's allegations of "agreements" that IPO allocants would divide profits with underwriters by purchasing large quantities of IPO stock in the aftermarket and by paying "unusually large commissions" for transactions in "unrelated se-

curities" (Pet. App. 19a-20a)—agreements also alleged by the Sherman Act plaintiffs. See *id.* at 17a-18a. Pfeiffer simply adds allegations that underwriters allocating IPOs "favored long-term investors over 'flippers.'" *Id.* at 75a, 121a.

That Pfeiffer recharacterizes the *Billing* plaintiffs' "tie-ins" as "bribes" makes no difference to the certworthiness of his case. The communications that Pfeiffer portrays as agreements to buy in the aftermarket and to hold rather than "flip" shares occurred in the midst of heavily-regulated IPOs. The SEC has explained that IPO underwriters may legitimately inquire about a customer's intent to "be a long-term holder" instead of a "flipper," whether the customer expects to purchase more shares in the aftermarket to build a long-term position, and the price at which it might accumulate that position. See Pet. 3; Pet. App. 224a. Similarly, allegations that commissions are excessive fall squarely within the SEC's and NASD's statutory authority (see *Gordon*, 422 U.S. at 681-682), implicating rules that expressly permit an underwriter to allocate IPO shares to good customers who generate substantial commissions. See Pet. 8.

Thus, when the conduct Pfeiffer labels as paying and receiving "bribes" in the aftermarket is viewed in the context of the underwriting process to which the alleged agreements relate, the question whether a particular instance is legal will depend on exactly where that conduct falls under fine lines that are carefully drawn by expert regulators and "continual[ly] adjust[ed]" in light of changing conditions. Pet. App. 195a. An example of the complex nature of this line-drawing process is the recent decision of an NASD panel in *Department of Enforcement* v. *Invemed Associates*, No. CAF030014 (NASD Office of Hearing Officers Mar. 3, 2006). There, an NASD panel concluded in a 94-page opinion, following a 17-day hearing, that a member firm had not engaged in illegal profit sharing by accepting higher-than-normal commission rates on 700 trades from customers seeking allocations of "hot" IPOs. Painstakingly reviewing commission payments

and customer relationships, the panel concluded that rules promulgated under the securities laws do not prohibit underwriters from allocating IPO shares to good customers, that customers may voluntarily increase order flow and commission payments to increase their chances of obtaining allocations, and that no illicit agreements or "bribes" were involved. As petitioners and the SEC have shown and the SROs confirm, to have antitrust juries assess defendants' conduct under "competition first" principles would make "nuanced distinctions" of this sort a nullity, undermining the "comprehensive and carefully reticulated securities regulatory regime that—unlike the antitrust laws—promotes both competition and * * * market stability and capital formation." NASD Br. 7, 9; see NYSE Br. 13.

2. Pfeiffer's assertion (at 3-4) that the Second Circuit faithfully followed *Gordon*, creating no novel test for immunity, does not withstand scrutiny. To be sure, this Court looks to congressional intent to determine if immunity is proper. It has never, however, adopted anything like the narrow, multipart test for congressional intent applied by the court of appeals, requiring that Congress specifically immunized the exact practice at issue and empowered the SEC to compel that practice, that the SEC in fact permitted that practice, and that application of the antitrust laws would moot a provision of the securities laws. See Pet. 22-24; NASD Br. 6-7.

In *Gordon* this Court found immunity—as urged by the SEC and opposed by the Department of Justice—because Congress had granted to the SEC broad authority "to oversee the fixing of commission rates" and application of the antitrust laws would "render nugatory the legislative provision for regulatory agency supervision." 422 U.S. at 688, 691; see Pet. 20. The district court and the SEC correctly concluded that *Gordon* is directly applicable here, where Congress conferred on the SEC and SROs comprehensive authority to regulate all the practices alleged by plaintiffs and application of the antitrust laws would create the potential for conflicting

standards. See Pet. App. 86a, 193a; NASD Br. 13-17; NYSE Br. 12-13; see also *NASD*, 422 U.S. at 724-725, 735 (finding immunity where Congress empowered the SEC "flexibly" to address practices it believed were "detrimental," so that antitrust laws created the potential for "inconsistent standards"). Regulation of the IPO process and aftermarket conduct growing out of it lies at the heart of the SEC's authority under securities statutes this Court has described as the "ancho[r]" of "regulation of vital elements of our economy." *Merrill Lynch* v. *Dabit*, 126 S. Ct. 1503, 1509 (2006).

Tellingly, Pfeiffer does not so much as mention *Trinko*, which reaffirms that *Gordon* and *NASD* require immunity when there is a "real possibility of [antitrust] judgments conflicting with the agency's regulatory scheme." 540 U.S. at 406. In the face of a savings clause that barred immunity, *Trinko* nevertheless held that the antitrust laws should not be applied where a jury's judgments are likely to result in "[m]istaken inferences" and "false condemnations" that are costly and not outweighed by "the slight benefits of antitrust intervention" piled on top of other available "litigation routes"—factors that also support dismissal here. *Id.* at 406, 414; see *Dabit*, 126 S. Ct. at 1514 (permitting "parallel class actions" under "different standards" applied to the same facts is "wasteful" and "duplicative"); NASD Br. 15; HERBERT HOVENKAMP, THE ANTITRUST ENTERPRISE 237 (2005).

3. Pfeiffer's contention (at 4) that no deference is due the SEC's view that immunity is necessary here is riddled with errors. Pfeiffer concedes that courts "defer" to expert agencies charged by Congress with regulating the area in question. See *Gordon*, 422 U.S. at 689-690 (deferring to the SEC's view that immunity was necessary "[g]iven the expertise of the SEC" and "the confidence the Congress has placed in the agency"); *NASD*, 422 U.S. 694 (agreeing with SEC that immunity was required); Pet. 30. Pfeiffer's assertion that this Court should ignore the SEC's considered position because the SEC "always finds implied repeal" is wrong. The

SEC did not urge immunity in *Silver*, for example, where it lacked jurisdiction over the exchange rules at issue.

Pfeiffer's assertion (at 4) that *Silver* held there can be no immunity unless the SEC can "authorize or require" challenged conduct is also erroneous. Immunity was denied in *Silver* because the SEC lacked jurisdiction over exchange rules requiring removal of telephone connections to nonmembers so there was no "agency check" on the behavior at issue. 373 U.S. at 359-360. In *Gordon* and *Trinko*, even challenges to practices *forbidden* under the regulatory scheme (see 422 U.S. at 679-682, 540 U.S. at 405-406) were dismissed to give the agency sufficient room to regulate.

Pfeiffer's narrow focus on whether the SEC can permit or require conduct misses the significant practical issue here: empowering antitrust juries to determine what IPO conduct is unlawful would deter beneficial activities that the SEC does permit. See Pet. 9; Pet. App. 156a, 193a-194a, 197a. The SEC and NASD have punished conduct they believe crossed the line for permissible bookbuilding and IPO allocation practices. Pet. App. 137a-138a, 196a; NASD Br. 12. There is no reason to think that antitrust juries would draw the line under the Sherman or Robinson-Patman Act at the same place; accordingly, the threat of treble damages liability will make antitrust concerns "the predominant considerations in the underwriting process." Pet. App. 194a; see NYSE Br. 3, 13 (the threat of treble damages will impair the "ability of SROs and the SEC to develop finely calibrated regulatory responses for this rapidly-changing industry").

4. Contradicting Pfeiffer's assertion (at 5) that treble damages antitrust suits pose no threat to capital formation, the NASD, which has statutory responsibility to regulate the conduct of securities firms during IPOs under the close oversight of the SEC, has informed this Court that "pervasive litigation" and "crippling regulatory confusion" will result from the Second Circuit's ruling, undermining the NASD's and

the SEC's ability to regulate "in a manner that promotes market stability and capital formation" and "significantly disrupt[ing]" the securities market to the detriment of "the investments of millions of Americans." NASD Br. 2, 9. The SEC warned the courts below of the same adverse effects on the capital markets. Pet. App. 193a-197a (the fear of treble damages awards will "discourag[e]" conduct that "would serve the interests of the markets and the capital formation process," "distort[ing] market participant behavior in ways that are harmful to the overall securities markets").

That underwriters announced profits two months after the Second Circuit denied rehearing—a ruling that was stayed by the panel pending this Court's review—hardly contradicts the SEC's and NASD's conclusion that treble damages class actions are a matter of great concern. Opp. 5. Plaintiffs looking for uncompensated "insurance against market losses" naturally seek out perceived "deep pockets." *Dura Pharms.*, 125 S. Ct. at 1633. The risk of treble damages liability for massive stock market fluctuations will inevitably have the harmful effect securities regulators have identified and lead to blackmail settlements. In the wake of the Second Circuit's decision, new class action antitrust complaints have already been filed against the securities industry based on alleged omissions and misstatements in securities transactions—the undisputed province of the federal securities laws. See *Electronic Trading Group* v. *Banc of America Sec., et al.*, 06 CV 2859 (S.D.N.Y., complaint filed Apr. 12, 2006) (alleging conspiracy among numerous broker-dealers to collect concealed commission charges from short sellers, even though an SEC regulation addressed the practice and suit could have been filed under the securities laws).

Treble damages antitrust suits are particularly injurious in the securities area, because Congress in the PSLRA adopted reforms aimed at "abuses of the class-action vehicle in litigation involving nationally traded securities," including the "targeting of deep-pocket defendants" and extraction of "ex-

tortionate settlements." *Dabit*, 126 S. Ct. at 1510-1511. An antitrust suit is subject to none of the limitations on securities suits imposed in the PSLRA. And it bypasses Congress's prohibition on punitive awards by demanding massive treble damages recoveries. This Court recently rejected a "narrow reading" of the Securities Litigation Uniform Standards Act by the Second Circuit that "undercut the effectiveness" of the PSLRA. *Id.* at 1513. The Second Circuit's narrow interpretation of implied immunity law to allow plaintiffs to bypass the PSLRA's restrictions by recycling securities claims as antitrust violations should suffer the same fate. See *IPO Sec. Litig.*, 241 F. Supp. 2d 281 (S.D.N.Y. 2003) (securities fraud suits based on same conduct alleged by Pfeiffer); *Trinko*, 540 U.S. at 414 (dismissal required where "[j]udicial oversight under the Sherman Act would seem destined to distort investment and lead to a new layer of interminable litigation, atop the variety of litigation routes already available").

5. Immediate review is essential if the adverse consequences identified by petitioners, amici, and the SEC are to be averted. Absent review, district court judges in the Second Circuit—the center of both the securities and securities litigation industries—will reject implied immunity defenses presented in motions to dismiss, which cannot be appealed. Only by withstanding a trial on the merits—consuming tremendous resources, presenting enormous liability risks, and providing a usually irresistible incentive to settle—could a defendant again hope to bring the issue before this Court. The self-insulating nature of the Second Circuit's decision confirms that this is the time for the Court to review immunity issues critical to "the federal interest in protecting the integrity and efficient operation of the market for nationally traded securities." *Dabit*, 126 S. Ct. at 1509.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted.

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